Money Laundering Enforcement and Policy

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I. Introduction

The attacks of September 11, 2001, spurred significant changes in the legal regimes designed to combat money laundering and terrorist financing, both in the United States and around the globe. The two years following these attacks were marked by developments such as the passage of the USA PATRIOT Act[1] and fast-paced regulatory expansion in the United States. In addition, the Financial Action Task Force (FATF) adopted eight new Special Recommendations on terrorist financing, a major revision to the Forty Recommendations on anti-money laundering policy,[2] and the expansion of anti-money laundering regimes and enforcement cooperation by nations around the world. With these new rules and resources in place during 2004, the United States, the FATF, and the international community were able to focus on enforcement activities as well as implementation and refinement of the recently established rules. In addition, the legal profession has had a particular interest in the role of lawyers as gatekeepers in financial transactions and the resulting regulation of lawyers under anti-money laundering regimes in jurisdictions around the world.

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1. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, known as the "USA PATRIOT Act," was signed into law on October 26, 2001. Uniting and Strengthening America by Providing Appropriate Tool Required to Intercept and Obstruct Terrorism Act of 2001, H.R. 3162, 107th Cong. (2001), *available at* http://www.epic.org/privacy/terrorism/hr3162.pdf.

2. The FATF is an inter-governmental body whose purpose is to develop and promote policies, "both at the national and international levels, to combat money laundering and terrorist financing." Financial Action Task Force, *at* http://www.fatf-gafi.org (last visited May 27, 2005). "The FATF membership is currently made up of thirty-one countries and territories, and two regional organi[z]ations." *Id.*

II. U.S. Anti-Money Laundering Developments

A. Significant Enforcement Actions

Calendar year 2004 saw two of the more significant enforcement actions against U.S. financial institutions in recent years in the cases of *AmSouth Bank* and *Riggs Bank N.A.*

1. *AmSouth Bank*

On October 12, 2004, AmSouth Bank of Birmingham, Alabama (AmSouth) agreed to pay fines of $50 million for civil and criminal violations of the Bank Secrecy Act (BSA).[3] Regulators were led to AmSouth by an investigation of two men involved in a Ponzi scheme who had maintained accounts in furtherance of their scheme at the bank.[4] In June 2004, the Federal Reserve Bank of Atlanta, AmSouth's federal regulator for BSA purposes, conducted an examination of the bank and found that its anti-money laundering compliance program was insufficient, and that it had failed to file numerous mandatory Suspicious Activity Reports (SARs).[5] The Financial Crimes Enforcement Network (FinCEN) and the Federal Reserve Bank of Atlanta brought concurrent civil enforcement actions against AmSouth under which the bank agreed to pay a $10 million fine and take significant actions to improve its anti-money laundering compliance program.[6] At the same time, the Department of Justice (DoJ) struck a deferred prosecution agreement with AmSouth under which the bank would pay a $40 million fine, acknowledge its past behavior in violation of the BSA, and comply with applicable laws going forward.[7]

AmSouth provides important lessons to those charged with administering anti-money laundering compliance programs and counseling clients on dealing with enforcement agencies. First, AmSouth was penalized in part for failing to identify the use of its accounts in furtherance of a Ponzi scheme and failing to file a SAR in time.[8] Although FinCEN indicated that AmSouth ignored specific red flags signifying suspicious activity,[9] it can be difficult for banks to detect such Ponzi schemes. Second, the severity of the penalties leveled against AmSouth appears to reflect, in part, the earlier failures of AmSouth and its in-house counsel to respond fully to grand jury subpoenas, which the DoJ and other agencies viewed as obstructionist.[10] Financial institutions should bear this in mind when responding to any requests from federal regulators or law enforcement officials.

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3. Press Release, U.S. Dep't of Justice, AmSouth Bank Agrees to Forfeit $40 Million (Oct. 12, 2004), *available at* http://www.usdoj.gov/usao/mss/documents/pressreleases/october2004/amprsrels.htm [hereinafter AmSouth Press Release].

4. AmSouth also failed to respond properly to grand jury subpoenas for certain information, focusing further attention on the bank. *Id.*

5. FinCEN Assessment of Civil Money Penalty, *In re* AmSouth Bank, No. 2004-02 (Oct. 12, 2004), *available at* http://www.fincen.gov/amsouthassessmentcivilmoney.pdf [hereinafter FinCEN 2004 AmSouth Assessment]; Board of Governors of the Federal Reserve System Cease and Desist Order and Order of Assessment of a Civil Money Penalty, *In re AmSouth Bank*, Docket Nos. 04-021-B-HC, 04-021-B-SM, 04-021-CMP-HC, 04-021-CMP-SM (Oct. 12, 2004), *available at* http://www.federalreserve.gov/boarddocs/press/Enforcement/2004/20041012/attachment.pdf.

6. FinCEN 2004 AmSouth Assessment, *supra* note 5, at 1.

7. Deferred Prosecution Agreement, United States v. AmSouth Bank (S.D. Miss. Oct. 12, 2004), *available at* http://www.usdoj.gov/usao/mss/documents/pressreleases/october2004/was15759071.pdf; *see also* AmSouth Press Release, *supra* note 3, at ¶¶ 1-5.

8. *See* 12 C.F.R. § 21.11(b)(3) (2005) (defining what a SAR is and providing filing regulations).

9. *See* FinCEN 2004 AmSouth Assessment, *supra* note 5, at 6.

10. AmSouth Press Release, *supra* note 3, at ¶ 8.

AmSouth also demonstrates to financial institutions the importance of adequately training staff with regard to SAR filing requirements. The FinCEN 2004 AmSouth Assessment details several other suspicious activities for which AmSouth failed to file SARs in addition to the aforementioned Ponzi scheme.[11] Even in several instances where AmSouth personnel were aware of suspicious activities, they did not file SARs because the bank had not incurred a loss, the offending party had died, or the suspicious activity was telephonically reported to law enforcement.[12] None of these, however, is a valid justification for failing to file a SAR where otherwise required.

2. *Riggs Bank*

In another major enforcement action, Riggs Bank N.A. (Riggs) agreed to pay a $25 million civil penalty relating to alleged deficiencies in its anti-money laundering program, and pled guilty to a criminal violation for failing to file SARs relating to its banking relationships with Augusto Pinochet and Equatorial Guinea.[13] Resulting in over $40 million in total fines to date, this wide-ranging enforcement action has involved the U.S. Department of the Treasury's Office of the Comptroller of the Currency (OCC),[14] FinCEN, the DoJ, and an investigation by a Senate subcommittee.[15] The case also provides important lessons for banks and practitioners dealing with anti-money laundering compliance in such areas as relationships with "politically exposed persons"[16] and the consequences of failing to fully comply with SAR reporting requirements.

OCC investigations of Riggs led to a consent order in July 2003, requiring wide-ranging improvements to Riggs' anti-money laundering compliance program.[17] They also revealed that among Riggs' customers were former Chilean leader Augusto Pinochet, the countries of Equatorial Guinea, and the Kingdom of Saudi Arabia and various officials thereof.[18]

11. FinCEN 2004 AmSouth Assessment, *supra* note 5, at 6-8.

12. *Id.*

13. Steptoe & Johnson LLP is Special Criminal Counsel to Riggs Bank. *See also*, FinCEN Assessment of Civil Money Penalty, *In re* Riggs Bank, N.A. No. 2004-01 (May 14, 2004), *available at* http://www.fincen.gov/riggsassessment3.pdf [hereinafter FinCEN 2004 Riggs Assessment].

14. The OCC is the primary federal supervisory agency responsible for oversight of Riggs and examines the bank for compliance with the BSA and its implementing regulations. *See* 31 C.F.R. § 103.56 (2005).

15. The Permanent Subcommittee on Investigations of the Senate Committee on Government Affairs (Senate Government Affairs Subcommittee) commenced an investigation in early 2003 on the effectiveness and enforcement of key anti-money laundering programs under the USA PATRIOT Act using Riggs as a case study. *Money Laundering and Foreign Corruption: Enforcement of the PATRIOT ACT: Hearing Before the Permanent Subcomm. on Investigations of the Comm. on Gov'tal Affairs*, 108th Cong. (2004), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_senate_hearings&docid=f:95501.wais.pdf [hereinafter Senate Subcommittee Hearing Report]; *see also Minority Staff Report*, 108th Cong. (2004), *available at* http://hsgac.senate.gov/_files/ACF5F8.pdf (discussing the Riggs case study) [hereinafter Minority Staff Report].

16. *See e.g.* Senate Subcommittee Hearing Report, *supra* note 15, at 2, 28.

17. OCC Consent Order, *In re Riggs Bank N.A.*, No. 2004-43 (May 13, 2004), *available at* http://www.occ.treas.gov/FTP/EAs/ea2004-43.pdf (as modified and supplemented by OCC Consent Order No. 2005-1 (Jan. 27, 2005), *available at* http://www.occ.treas.gov/ftp/release/2005-7a.pdf) [hereinafter OCC 2004 Riggs Consent Order].

18. The OCC, FinCEN and later the DoJ, following the lead of the Senate Government Affairs Subcommittee, have made the following findings and allegations concerning these accounts:

(1) Pinochet and his wife maintained numerous accounts at Riggs and its affiliates from 1994 to 2002 with deposits of over $10 million. Riggs did not conduct adequate due diligence on the source of these funds, failed to report certain suspicious transactions relating to the accounts, altered the

Riggs has long provided banking services to numerous foreign governments, embassies, and their officials.

The OCC and FinCEN decided to bring civil enforcement actions against Riggs in 2004 after determining that Riggs did not comply with the July 2003 consent order.[19] The OCC and FinCEN alleged that Riggs, with regard to its Equatorial Guinea, Saudi Arabia, and other accounts, did not collect or maintain adequate information, and failed to report certain suspicious transactions relating to the accounts.[20] On May 13, 2004, Riggs agreed with the OCC and FinCEN to pay a $25 million fine and accept a supplemental consent order requiring the bank to consider staffing changes and implement enhanced anti-money laundering compliance procedures.[21] On January 27, 2005, Riggs announced an agreement settling criminal charges being prepared by the DoJ for Riggs' failure to file timely accurate SARs relating to the Pinochet and Equatorial Guinea accounts.[22] Riggs agreed to plead guilty to a single count indictment, accept responsibility for the DoJ's statement of background facts, pay a $16 million fine, and be subject to a five-year corporate probation.[23]

The FinCEN May 2004 Riggs Assessment provides useful guidance for banks and practitioners because it details FinCEN's perceptions of deficiency at Riggs in its internal controls, independent testing of compliance, designation of individuals to oversee compliance,

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names of some of the accounts to remove references to Pinochet, and assisted Pinochet in moving assets out of Riggs' London branch at a time when he faced charges and potential attachment of his assets in Europe. Riggs ended this banking relationship in 2002;

(2) Equatorial Guinea, its strongman Teodoro Obiang Nguema, and his relatives maintained numerous accounts at Riggs between 1996 and 2004 (by 2003 these accounts represented Riggs largest relationship with balances and outstanding loans of nearly $700 million). Equatorial Guinea is a small nation on the west coast of Africa that recently developed lucrative oil resources. Numerous large cash deposits were made into these accounts, suspicious wire transfers were made from the accounts, and Riggs failed to conduct appropriate due diligence into the funds in these accounts or maintain accurate information relating to the accounts and their purpose. Further, Riggs was accused of failing to timely file SARs and currency transaction reports regarding these transactions. Riggs has since ended this set of banking relationships;

(3) Riggs also has maintained relationships with Saudi Arabia and its officials. Riggs had not identified as suspicious, nor filed SARs for, certain transactions in which tens of millions of dollars were withdrawn in cash from accounts relating to the Saudi Embassy, dozens of sequentially numbered international drafts were drawn from officials' accounts and then returned to the bank, and dozens of sequentially numbered cashier's checks, payable to the account holder, were drawn from accounts of Saudi officials.

See OCC 2004 Riggs Consent Order, *supra* note 17; FinCEN 2004 Riggs Assessment, *supra* note 13, at 1-8; Senate Subcommittee Hearing Report, *supra* note 15, at 86-114, 126-198; Letter from Kenneth L. Wainstein to Mark J. Hulkower, United States v. Riggs Bank N.A., Cr. 05-35 (RMU) (July 27, 2005) (including attached "Statement of Offence"), *available at* http://www.moneylaundering.com/subscribers/resources/PDFs4DB/riggs_fin_off_statement_012705.pdf (subscription required) *and* http://www.moneylaundering.com/subscribers/resources/PDFs4DB/riggs_final_plea_012705.pdf (subscription required) [hereinafter Riggs 2005 Plea Agreement].

19. FinCEN 2004 Riggs Assessment, *supra* note 13, at 1.

20. *Id.* at 1-8.

21. *Id.* at 9-10.

22. Riggs 2005 Plea Agreement, *supra* note 18.

23. Riggs had already been undertaking substantial efforts to improve its anti-money laundering capabilities, and has been cooperating extensively with federal regulators and the DoJ. However, further action by the OCC or FinCEN is not precluded and the DoJ is pursuing criminal actions against certain Riggs employees. *Id.* at 6. For the terms of the corporate probation, *see id.* at 2.

and training of personnel.[24] In particular, FinCEN addressed in detail its expectations regarding Riggs' identification of high-risk geographic locations, customers, transactions or business lines, and reacting with appropriate enhanced due diligence, monitoring, and when necessary, suspicious activity and currency transaction reporting.[25]

One additional note of interest flowing from the Riggs enforcement action is that the Senate Government Affairs Subcommittee criticized the OCC for its oversight in this case.[26] This public rebuke of the OCC may lead to more aggressive enforcement by federal regulators with responsibility for anti-money laundering oversight under the BSA and USA PATRIOT Act.

3. *Additional Lessons from Enforcement Actions*

Both the *Riggs* and *AmSouth* cases are likely to have a significant impact on U.S. financial institutions. Of the two, *AmSouth* may prove to be the more significant precedent because, while certain financial institutions will need to address the challenges posed by politically exposed persons and foreign-owned private banking accounts, the limited number of banks serving these markets should already be aware of the associated risks and obligations. The AmSouth enforcement action demonstrates that anti-money laundering risks are not limited to such specialized customers and markets. Any bank could find itself the unwitting tool of a Ponzi or other similar fraudulent scheme and could face enforcement action if it does not maintain a vigilant eye for such abuses and fully cooperate with government investigatory demands.

The cases also demonstrate that failure to comply with BSA requirements can open financial institutions to the risk of criminal enforcement from the DoJ, in addition to administrative enforcement by federal regulators. In both of these cases, the DoJ actively pursued its own enforcement strategy where the banks failed to file timely and accurate SARs.

B. Reporting Practices Following *AmSouth* and *Riggs*

The criminal actions in both the *AmSouth* and *Riggs* cases were predicated primarily on the failure of each bank to file required SARs. The number of SARs from banks has been

24. FinCEN 2004 Riggs Assessment, *supra* note 13, at 2-4 (addressing the four required elements of anti-money laundering programs for OCC-regulated banks).

25. *Id.* Riggs' experience highlights the need for caution in conducting business with "politically exposed persons" such as Augusto Pinochet and Equatorial Guinean leader Teodoro Obiang Nguema. The USA PATRIOT Act requires that private banking accounts of senior political leaders, their family, and close associates receive enhanced scrutiny. *See* 31 U.S.C. § 5318(i) (2004).

26. *See* Senate Subcommittee Hearing Report, *supra* note 15, at 1-8. The attached Minority Staff Report stated that "the failure of supervision in the Riggs matter is not an isolated case, but symptomatic of a pattern of uneven and, at times, ineffective AML enforcement by federal regulators." Minority Staff Report, *supra* note 15, at 5. OCC regulators had noted concerns regarding Riggs' anti-money laundering compliance since 1997, but did not undertake more aggressive enforcement action, even after September 11, 2001 and the passage of the USA PATRIOT Act, until there had been outside scrutiny via news articles and the Senate Government Affairs Subcommittee investigation.

This provides another cautionary tale for financial institutions. Riggs' anti-money laundering programs had been repeatedly examined and found to meet minimum requirements by the OCC between 1997 and 2002. Given the change in political climate, Riggs, in short order, was subjected to substantial fines for alleged deficiencies in its anti-money laundering programs. Thus, financial institutions should not place reliance on a prior assessment of compliance by a federal regulator and assume that they are insulated from later enforcement action.

steadily increasing over time[27] and given the fines levied upon Riggs and AmSouth, banks are now even more inclined to file SARs. Former FinCEN director William Fox expressed concern in October 2004 that financial institutions are engaging in the "defensive filing" of SARs, given the enforcement climate, in cases when they may not be warranted.[28] At the same time, with the criticism leveled against the OCC relating to its enforcement against Riggs, as discussed above, the OCC has redoubled its enforcement efforts in the field.[29] Thus, there appears to be some tension developing between the enforcement goals of the OCC and other federal regulators and FinCEN's concerns with regard to overloading the SAR reporting system.[30] In the meantime, financial institutions subject to reporting requirements under the BSA are likely to continue to err on the side of caution and submit SARs to FinCEN.[31]

C. Special Measures Under Section 311

During 2004, the United States also utilized section 311 of the USA PATRIOT Act as an enforcement instrument. Section 311 allows FinCEN to designate a foreign jurisdiction, institution, class of transactions, or type of account as a "primary money laundering concern" and to impose certain "special measures" on those jurisdictions and institutions that pose money laundering concerns.[32] This statutory provision offers a means for the United States to apply pressure on non-cooperating countries or institutions, and thus combat money laundering and terrorist financing channels outside of this country. Section 311 had

27. "Between April 1996 and December 2003, 1,278,716 SARs were filed. The volume of SAR filings in 2003 was 453% higher than those filed in 1996." *The SAR Activity Review: By the Numbers*, Issue 2, at 1 (May 2004), *available at* http://www.fincen.gov/bythenumbersissue2.pdf.

28. *See* Richard Cowden, *Money Laundering: In Age of 'Zero Tolerance' Banks, Agencies Look to Strike Balance on Proper SARs Filing*, BNA's Banking Report News, 83 BBR 665 (Nov. 1, 2004), *available at* http://www.blankrome.com/Publications/articles-quoted/comisky-westlaw.pdf (quoting Fox's statements at the American Bankers Association/American Bar Association Conference in October 2004).

29. The OCC has directed "all OCC examination staff to raise their level of alert for suspicious or high-risk accounts." OCC News Release 2004-43, Comptroller Hawke Directs Review of Agency's Handling of Bank Secrecy Act Compliance at Riggs Bank N.A. (June 3, 2004), *available at* http://www.occ.treas.gov/scripts/newsrelease.aspx?Doc=E3AUFIXG.xml.

30. FinCEN has sought to clarify, in published guidance, that neither it nor any other federal regulators evaluate compliance with anti-money laundering regulations based on the number of SARs submitted. A significant deviation, however, from peer institutions or a financial institution's past record in filing SARs "would warrant further review by the examiners when evaluating the adequacy of an institution's Bank Secrecy Act/Anti-Money Laundering program." Bank Secrecy Act Advisory Group, *The SAR Activity Review: Tips, Trends & Issues*, Issue 7, at 49-52 (Aug. 2004), *available at* http://www.fincen.gov/sarreviewissue7.pdf.

31. In a January 10, 2005 letter to the several federal regulatory agencies with money laundering oversight responsibilities, banking industry representatives stated their concern that "SARs . . . are in danger of becoming routine filings that simply dilute FinCEN's database. The increase can be attributed to 'defensive filing' by banks that fear regulatory criticism or, worse, enforcement actions because of failing to file a SAR." *See* Letter from ABA and state banking associations, to Chairmen and Directors of FDIC, OCC, Dep't of Treasury, Fed. Reserve Bd., Office of Thrift Supervision, and FinCEN (Jan. 10, 2005), *available at* http://www.aba.com/aba/documents/winnews/stexletterrebsa010405.pdf.

32. 31 U.S.C. § 5318A (Supp. 2004). The special measures that may be imposed on a target under section 311 include requiring any domestic financial institution or agency to undertake specific recordkeeping and reporting requirements with regard to the target, maintaining information on beneficial ownership of the institution or agency's accounts, maintaining information on correspondent or pay-through accounts, and prohibiting or placing conditions upon correspondent or pay-through accounts. *Id.*

previously been employed by the United States in coordination with the FATF's designation of non-cooperating countries and territories (NCCTs) and its calls for countermeasures.[33]

This past year, however, FinCEN used section 311 in several cases as a more independent extraterritorial enforcement tool, proposing to designate the Commercial Bank of Syria, Infobank of Belarus, and First Merchant Bank OSH Limited of Turkish-controlled Cyprus, as financial institutions of primary money laundering concern notwithstanding the fact that none of these banks hailed from countries designated by the FATF as non-cooperating or as requiring countermeasures.[34] The United States appeared to be pursuing its own foreign policy and money laundering enforcement goals through these designations rather than cooperating with multilateral efforts.[35] FinCEN proposed the special measure of prohibiting the opening or maintaining of correspondent accounts for or on behalf of each of the above institutions and their affiliates in any covered financial institution in the United States.[36]

33. FinCEN first invoked section 311 in December 2002, when it proposed designating Ukraine and Nauru as primary money laundering concerns given the FATF's call for countermeasures on those countries. Departmental Offices Designation of Nauru and Ukraine as Primary Money Laundering Concerns, 67 Fed. Reg. 78859 (Dec. 26, 2002). FinCEN imposed countermeasures on Nauru in April of 2003, but withdrew its designation of Ukraine as a primary money laundering concern after the FATF withdraw its call for countermeasures. *See* Financial Crimes Enforcement Network; Imposition of Special Measures Against the Country of Nauru, 68 Fed. Reg. 18917 (proposed Apr. 17, 2003) (to be codified at 31 C.F.R. pt. 103); Revocation of Designation of Ukraine as Primary Money Laundering Concern, 68 Fed. Reg. 19071 (proposed Apr. 17, 2003). On November 25, 2003, FinCEN designated the country of Burma (Myanmar) and two individual financial institutions, Myanmar Mayflower Bank and Asia Wealth Bank, as primary money laundering concerns following an FATF call for countermeasures on Burma. Designation of Burma as a Jurisdiction of Primary Money Laundering Concern; Designation of Myanmar Mayflower Bank and Asia Wealth Bank as Financial Institutions of Primary Money Laundering Concern, 68 Fed. Reg. 66298 (Nov. 25, 2003).

34. Imposition of a Special Measure Against Commercial Bank of Syria, Including Its Subsidiary, Syrian Lebanese Commercial Bank, as a Financial Institution of Primary Money Laundering Concern, 69 Fed. Reg. 28098 (proposed May 18, 2004) (to be codified at 31 C.F.R. § 103.188) [hereinafter Commercial Bank of Syria]; Imposition of Special Measure Against Infobank as a Financial Institution of Primary Money Laundering Concern, 69 Fed. Reg. 51973 (proposed Aug. 24, 2004) (to be codified at 31 C.F.R. § 103.190) [hereinafter Infobank]; Imposition of Special Measure Against First Merchant Bank OSH Ltd, Including Its Subsidiaries, FMB Finance Ltd, First Merchant International Inc, First Merchant Finance Ltd, and First Merchant Trust Ltd, as a Financial Institution of Primary Money Laundering Concern, 69 Fed. Reg. 51979 (proposed Aug. 24, 2004) (to be codified at 31 C.F.R. § 103.189) [hereinafter First Merchant Bank].

35. *See generally* Commercial Bank of Syria, *supra* note 34; Infobank, *supra* note 34; First Merchant Bank, *supra* note 34. Commercial Bank of Syria is the primary Syrian government-owned bank and, until recently, the only Syrian bank authorized to engage in foreign currency transactions. It was designated as a primary money laundering concern for its use in circumventing the Iraqi oil-for-food programs and maintenance of accounts containing the illicit proceeds of such oil sales, its use by terrorists and associates of terrorist organizations, and the occurrence of various suspicious transactions at the bank. Commercial Bank of Syria, *supra* note 34, at 28099-100. Infobank, a Belarus entity, was also designated in part given its prior relationship with and continued holding of accounts of the former Iraqi regime, as well as its role in arms exports (through a subsidiary) to nations considered by the U.S. to be state sponsors of terrorism. *See* Infobank, *supra* note 34, at 51974-75. First Merchant Bank OSH Ltd. was designated after its Chairman was indicted by a grand jury in New York as a co-conspirator in several fraudulent schemes involving the bank and subsequently became a fugitive. The bank was alleged to have been involved in other substantial misconduct and had ties to organized crime. *See* First Merchant Bank, *supra* note 34, at 51980-83. All three banks were noted to be from jurisdictions lacking adequate anti-money laundering regimes.

36. *See* Commercial Bank of Syria, *supra* note 34, at 28100; Infobank, *supra* note 34, at 51875; First Merchant Bank, *supra* note 34, at 51982. Barring sanctioned banks from maintaining correspondent accounts with U.S.

On April 12, 2004, FinCEN also finalized special measures proposed in November 2003 against Myanmar (Burma) and two financial institutions from that country—Myanmar Mayflower Bank and Asia Wealth Bank.[37]

D. Other Regulatory Developments

FinCEN issued two noteworthy interpretive rulings in 2004 providing guidance on the overlap of FinCEN and the Department of the Treasury's Office of Foreign Assets Control (OFAC) reporting requirements and on how money services businesses (MSBs) should treat foreign agents and counterparties in their anti-money laundering programs.[38]

First, U.S. financial institutions are required to block assets in which any OFAC-regulated country or Specially Designated Nationals or Blocked Parties (certain terrorists, terrorist organizations, and narcotics traffickers and kingpins) have an interest and to file a blocking report with the OFAC.[39] Blocked transactions relating to such Specially Designated Nationals or Blocked Parties are also suspicious transactions normally requiring the submission of SARs to FinCEN, thus subjecting financial institutions to overlapping reporting requirements.[40] In Interpretive Release 2004-02, FinCEN reversed its prior policy and provided that a blocking report to OFAC will also satisfy the SARs requirements unless the financial institution has additional information not provided in the blocking report, or the transaction was independently suspicious and would have required a SAR even absent OFAC regulation.[41]

Second, FinCEN also issued guidance clarifying that it expects MSBs to recognize the potential risks of relationships with foreign agents and counterparties and provide for suitable risk-based due diligence, monitoring, and when necessary, corrective actions.[42]

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financial institutions broadly blocks the banks from access to the U.S. financial system. Correspondent accounts are accounts established to receive deposits from, or make payments or other disbursements on behalf of, a foreign bank or handle other financial transactions related to the foreign bank. U.S. financial institutions are also required to apply special due diligence to their correspondent accounts to ensure that the sanctioned banks are not accessing the U.S. financial system indirectly through other institutions' accounts.

37. The special measures prohibit the opening or maintaining of correspondent accounts for or on behalf of a Myanmar financial institution in any covered financial institution in the United States, including any correspondent accounts of other foreign banks used to service Myanmar financial institutions. This prohibition would not apply to any account not prohibited under the U.S.-Myanmar OFAC sanctions regime, with the exception of situations involving Myanmar Mayflower Bank and Asia Wealth Bank for which the prohibition is absolute. Note that while the OFAC regime would prohibit U.S. financial institutions from dealing with financial institutions in Myanmar, the prohibition on correspondent banking also applies to branches of Myanmar financial institutions outside of Myanmar. *See* Imposition of Special Measures Against Burma, 69 Fed. Reg. 19093 (proposed Apr. 12, 2004) (to be codified at 31 C.F.R. pt. 103); Imposition of Special Measures Against Myanmar Mayflower Bank and Asia Wealth Bank, 69 Fed. Reg. 19098 (proposed Apr. 12, 2004) (to be codified at 31 C.F.R. pt. 103).

38. *See* Interpretive Release 2004-02—Unitary Filing of Suspicious Activity and Blocking Reports, 69 Fed. Reg. 76847 (proposed Dec. 23, 2004) (to be codified at 31 C.F.R. pt. 103) [hereinafter Interpretive Release 2004-02]; Interpretive Release 2004-1—Anti-Money Laundering Program Requirements for Money Services Businesses With Respect to Foreign Agents or Foreign Counterparties, 69 Fed. Reg. 74439 (Proposed Dec. 14, 2004) (to be codified at 31 C.F.R. pt. 103) [hereinafter Interpretive Release 2004-1]. Note that transactions or accounts involving persons owned by, or who are nationals of, sanctioned countries would not generally require SARs unless the activity itself were suspicious under applicable rules.

39. Interpretive Release, *supra* note 38, at 76847-48.

40. *Id.*

41. *Id.* at 76848.

42. *See* Interpretive Release 2004-1, *supra* note 38, at 74439.

Finally, it is worth noting that in 2004, FinCEN did not make any of the several outstanding proposed or notice rules final. The agency has issued proposed rules requiring that mutual funds file SARs, and to require anti-money laundering programs for "dealers in precious metals, stones, or jewels," commodity trading advisors, and investment advisors.[43] It has also issued advanced notices of proposed rulemaking on the potentially complicated or controversial application of anti-money laundering programs to vehicle sales, travel agencies, and persons involved in real estate closings.[44]

E. Supreme Court Ruling on Money Laundering Conspiracy Statute

In 2004, the U.S. Supreme Court heard *Whitfield v. United States*,[45] a case requiring interpretation of the conspiracy provision of the U.S. criminal anti-money laundering statue at 18 U.S.C. § 1956(h). In its recent decision, the Court found that section 1956(h) does not require the government to demonstrate an overt act in furtherance of the alleged conspiracy in order to obtain a conviction.[46] Although the decision was not surprising to criminal law practitioners, it may lead to more successful prosecutions of money laundering conspiracy charges.

III. Financial Action Task Force & International Developments

A. Implementation of the Revised Forty Recommendations

On February 27, 2004, the FATF adopted implementation guidance on the revised Forty Recommendations.[47] The FATF had revised its Forty Recommendations in June 2003, updating the set of prescriptions that serve as the international standard for anti-money laundering policies.[48] While the 2004 implementation guidance does not expand or modify the Forty Recommendations, it provides a common framework for assessing compliance.

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43. *See* Amendment to the Bank Secrecy Act Regulations—Requirement that Mutual Funds Report Suspicious Transactions, 68 Fed. Reg. 2716 (proposed Jan. 21, 2003) (to be codified at 31 C.F.R. pt. 103); Anti-Money Laundering Programs for Dealers in Precious Metals, Stones, or Jewels, 68 Fed. Reg. 8480.8485 (proposed Feb. 21, 2003) (to be codified at 31 C.F.R. pt. 103); Anti-Money Laundering Programs for Commodity Trading Advisors, 68 Fed. Reg. 23640 (proposed May 5, 2003) (to be codified at 31 C.F.R. pt. 103); Anti-Money Laundering Programs for Investment Advisers, 68 Fed. Reg. 23646 (proposed May 5, 2003) (to be codified at 31 C.F.R. pt. 103).

44. *See* Anti-Money Laundering Programs for Businesses Engaged in Vehicle Sales, 68 Fed. Reg. 8568 (proposed Feb. 24, 2003) (to be codified at 31 C.F.R. pt. 103); Anti-Money Laundering Programs for Travel Agencies, 68 Fed. Reg. 8571 (proposed Feb. 24, 2003) (to be codified at 31 C.F.R. pt. 103); Anti-Money Laundering Programs for "Persons Involved in Real Estate Closings and Settlements," 68 Fed. Reg. 17569 (proposed Apr. 10, 2003) (to be codified at 31 C.F.R. pt. 103) [hereinafter Persons Involved].

45. Whitfield v. United States, 125 S. Ct. 687 (2005).

46. *Id.* at 694.

47. *See* FATF-GAFI, *Financial Action Task Force on Money Laundering, Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 8 Special Recommendations* (Feb. 27, 2004), *available at* http://www.fatf-gafi.org/dataoecd/46/48/34274813.pdf.

48. Id. at 1. The first Forty Recommendations were adopted by the FATF in 1990. These were subsequently revised in 1996. The latest revised Forty Recommendations were officially adopted in the FATF June 2003 Plenary in Berlin. These revised recommendations were designed to adapt enforcement and prevention policies to current and developing money laundering tactics, as well as further bolster international cooperation in anti-money laundering efforts.

B. Role of the IMF and World Bank in Implementing Anti-Money Laundering Policies

In 2004, in coordination with the FATF, the International Monetary Fund (IMF) and World Bank undertook an expanded and permanent role in assessing and monitoring the implementation of anti-money laundering and counter-terrorist financing policies.[49] This marked an important development in how the international community organizes its efforts to address money laundering issues.

The IMF adopted a proposal in March 2004 to make anti-money laundering and counter-terrorist financing assessments (AML/CFT Assessments), as well as the provision of related technical assistance, a regular part of its efforts to protect the integrity of the international financial system.[50] Going forward, the IMF will include AML/CFT Assessments in the IMF's Financial System Stability Assessments within the framework of the Financial Sector Assessment Program, a joint IMF-World Bank initiative designed to assess the strengths and weaknesses of countries' financial sectors.[51] The AML/CFT Assessments will be conducted by either the IMF, World Bank, FATF, or FATF-style regional bodies, and be based on the FATF's February 27, 2004 implementation guidance discussed above.[52]

The IMF and World Bank have significant influence and an established role in assessing countries' financial systems and providing technical assistance. Adoption of FATF policy guidance and inclusion of FATF-style AML/CTF Assessments in IMF and World Bank reviews of members' financial systems provides a significant new platform to facilitate implementation of responsible and consistent anti-money laundering and counter-terrorist financing policies around the globe. In fact, the IMF and World Bank role could ultimately supplant the FATF NCCT initiative as the primary multilateral means of exerting pressure toward anti-money laundering and counter-terrorist financing compliance.[53]

C. Removal of Countries from NCCT List and End of Countermeasures

Although the FATF continues to implement the NCCT initiative, the NCCT list continued to dwindle in 2004, and the FATF withdrew its two remaining calls for counter-

49. *See* IMF Public Information Notice No. 04/33, IMF Executive Board Reviews and Enhances Efforts for Anti-Money Laundering and Combating the Financing of Terrorism (Apr. 2, 2004), *available at* http://www.imf.org/external/np/sec/pn/2004/pn0433.htm [hereinafter IMF PIN]. In partnership with the World Bank and the FATF, the IMF had participated in a 12-month pilot program of AML/CFT Assessments, which was completed in October 2003. The AML/CFT Assessments, forty-one in all, were based on the FATF Forty Recommendations, the Eight Special Recommendations, and their implementing guidance. The IMF conducted twenty of the assessments, the World Bank conducted six assessments, and seven assessments were conducted jointly by the IMF and World Bank. The FATF and FATF-Style Regional Bodies conducted the remaining eight assessments.

50. *Id.*

51. *See* IMF, *The IMF and the Fight Against Money Laundering and the Financing of Terrorism* (Sept. 2004), *available at* http://www.imf.org/external/np/exr/facts/aml.htm. AML/CTF Assessments also will be carried out by the IMF as part of voluntary assessments of Offshore Financial Centers.

52. *Id.*

53. The IMF opposes the NCCT initiative and has indicated that if the FATF engages in further rounds of NCCT designation, the IMF may reconsider its cooperation with the FATF. *See* IMF PIN, *supra* note 49, at ¶ 11; *See also* Journal Express, *FATF Blacklist is Being Supplanted by Other Global Pressures* (Mar. 2004), *available at* http://www.jornalexpress.com.br/noticias/detalhes.php?id_jornal=2403&id_noticia=1920.

measures.[54] The FATF removed Egypt and Ukraine from the NCCT list at its February 2004 Plenary and Guatemala at its July 2004 Plenary, citing compliance with improvements sought by the FATF in those countries' anti-money laundering regimes.[55] In addition, in October 2004 the FATF removed its call for counter-measures against Nauru and Myanmar given the progress in those countries, but maintained both countries on the NCCT list due to remaining deficiencies in their anti-money laundering laws and implementation thereof.[56]

D. FATF Adopts New Special Recommendation IX

In October 2004, the FATF adopted Special Recommendation IX, which calls on countries to take measures to stop the cross-border movement of currency and monetary instruments in order to promote efforts against terrorist financing.[57] This new Special Recommendation IX and its accompanying interpretive note state that all countries should have measures to detect physical cross-border transportation of currency or bearer negotiable instruments.[58] Legal authorities in each country should have the ability to stop or restrain such currency or negotiable instruments that are either undeclared or otherwise suspicious and the ability to obtain further information from the carrier.[59] Finally, countries should maintain effective, proportionate, and dissuasive sanctions for failure to properly disclose currency or negotiable instruments or for carrying such currency or instruments for purposes relating to money laundering or terrorist financing.

IV. EU Draft Amended Directive

In another development that should accelerate the implementation of FATF policies, the European Commission proposed a new directive (Proposed 3rd EU Directive)[60] designed

54. *See* FATF-GAFI, *Financial Action Task Force on Money Laundering, Annual Review of Non-Cooperative Countries or Territories* (July 2, 2004), *available at* http://www.fatf-gafi.org/dataoecd/3/52/33922473.pdf.

55. *See* FATF-GAFI, *More Information about the Non-Cooperative and Territories Initiative, at* http://www.fatf-gafi.org/document/51/0,2340,en_32250379_32236992_33916403_1_1_1_1,00.html (last visited May 27, 2005). The remaining countries on theNCCT list are the Cook Islands, Indonesia, Myanmar, Nauru, Nigeria, and the Philippines.

56. *See* Press Release, FATF Targets Cross-Border Cash Movements by Terrorists and Criminals (Oct. 22, 2004), *available at* http://www.fatf-gafi.org/dataoecd/8/5/34301987.pdf.

57. FATF-GAFI, *Nine Special Recommendations on Terrorist Financing, at* http://www.fatf-gafi.org/document/9/0,2340,en_32250379_32236920_34032073_1_1_1_1,00.html (last visited May 27, 2005) [hereinafter Nine Special Recommendations].

58. *See id.* In implementing Special Recommendation IX, the FATF removed Recommendation 19(a) from the Forty Recommendations and its interpretive note. Recommendation 19(a) had indicated countries "should consider" implementing measures to detect or monitor the physical cross-border transport of currency or bearer-negotiable instruments; the language in this recommendation was more permissive than the obligatory language adopted in Special Recommendation IX. *Id.* at ¶ 17.

59. *See id.* The interpretive note indicates that countries should cooperate in enforcing Special Recommendation IX and that information relating to cross-border currency or negotiable instrument transfers should be made available to other countries' financial intelligence units (FIUs). *See* FATF-GAFI, *Interpretive Note to Special Recommendation IX: Cash Couriers, at* http://www.fatf-gafi.org/document/25/0,2340,en_32250379_32236930_34287513_1_1_1_1,00.html (last visited May 27, 2005).

60. Commission Proposal for a Directive of the European Parliament and of the Council on the Prevention of the Use of the Financial System for the Purpose of Money Laundering, Including Terrorist Financing, COM (2004) 448 final, *available at* http://europa.eu.int/eur-lex/en/com/pdf/2004/com2004_0448en01.pdf [hereinafter Proposed 3rd EU Directive].

to require EU members to bring their laws in line with the revised Forty Recommendations and Special Recommendations on terrorist financing. The Proposed 3rd EU Directive, if adopted, would replace the currently operative directive of December 4, 2001 from the European Parliament and the Council of the European Union (2nd EU Directive).[61] Some of the more noteworthy changes found in the Proposed 3rd EU Directive include:

(1) Specifically widening the definition of money laundering to address terrorist financing, including the provision or collection of lawfully derived property with the intent or knowledge that it will be used to support terrorism.[62]
(2) Defining politically exposed persons (PEPs)[63] and requiring enhanced due diligence, monitoring, and approval with regard to such persons.[64]
(3) Providing more detailed "know-your-customer" due diligence requirements with respect to "beneficial ownership."[65]

The Proposed 3rd EU Directive has had a mixed reception, but most observers have acknowledged that revisions are necessary to bring EU members in line with FATF standards. Critics have noted that European industry and some EU countries are still adjusting to and implementing the recent 2nd EU Directive. If adopted, the Proposed 3rd EU Directive would require implementation by EU members within twelve months.[66]

V. The Role of Lawyers as "Gatekeepers"

Over the past several years, one of the more controversial topics in money laundering enforcement has been the issue of how countries should treat professionals such as lawyers, accountants, and financial advisors who facilitate transactions and otherwise act as gatekeepers to the financial and business systems within nations and throughout the global economy. These professionals are believed to be in a unique position to observe transactions and identify potential suspicious activities that may indicate money laundering, terrorist financing, or other unlawful conduct. These gatekeeper professionals, however, are often subject to confidentiality commitments, professional secrecy, or legal privileges that underlie the very professional relationships that allow them to perform these necessary gatekeeping roles.

The revised Forty Recommendations provide for a gatekeeping role for lawyers when engaged in certain transactions, but include language protecting confidentiality and legal privilege.[67] The 2nd EU Directive similarly provides that independent legal professionals,

61. *Id.* at 2-3.
62. *Id.* at 3, art. 1.
63. *Id.* at 16. Article 3(10) provides that "'politically exposed persons' means natural persons who are or have been entrusted with prominent public functions and whose substantial or complex financial or business transactions may represent an enhanced money lundering risk and close family members or close associates or such persons." *Id.*
64. *Id.* at 19-20.
65. *Id.* at 4; *see also id.* at 16-17, arts. 6-7.
66. Further, businesses have criticized some of the new definitions and proposed rules, particularly relating to beneficial ownership and treatment of PEPs. *See, e.g.*, European Banking Industry Committee, EBIC Position Regarding the Council General Approach on the Proposal for a New EU Directive on Money Laundering (DOC 14981/2004) (Jan. 11, 2005), *available at* http://www.eubic.org/Position%20papers/14%20EBIC%20opinion%20AML.pdf.
67. *See* Nine Special Recommendations, *supra* note 57.

when engaged in a transactional role, are subject to certain reporting requirements, but also provides for confidentiality and legal privilege. The Proposed 3rd EU Directive would maintain these requirements on independent legal professionals, largely unchanged.[68]

In the United States, no gatekeeper initiatives have been instituted to date.[69] The U.S. Department of the Treasury is continuing to assess U.S. compliance with the FATF Forty Recommendations in regards to the legal profession, is being cautious, and is reaching out to all potentially affected parties, including lawyers, to understand the best way to proceed.

68. Proposed 3rd EU Directive, *supra* note 60, at 5-6, 23-25. EU members must require independent legal professionals acting in a transactional role to report suspicious transactions to their FIU or a designated self-regulatory body that will cooperate with the FIU. No reporting is required where independent legal professionals have received information in the course of "ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings." In addition, although independent legal professionals may not disclose reports of suspicious activities, seeking to dissuade a client from engaging in illegal activity would not constitute such a disclosure. *Id.* at 23, art. 20.

69. Persons Involved, *supra* note 44, at 17569. The U.S. legal profession encountered the first potential gatekeeper requirements in April 2003 when FinCEN issued an "advance notice of proposed rulemaking" for applying anti-money laundering compliance program requirements to "persons involved in real estate closings and settlements." *Id.* at 17569. FinCEN noted that lawyers involved in real estate transactions could be subject to the rule. *Id.* at 17570-71. With regard to attorneys, FinCEN noted that Section 352(a) of the USA PATRIOT Act does not prescribe any reporting requirements, and thus, does not raise issues of attorney-client privilege in this case. *Id.* However, the notice also stated that, as required by the BSA, all persons involved in real estate transactions must report receipt of cash or cash equivalents over $10,000 in conducting the transaction. *Id.*